

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 1472 of 2017

Smt. Chandra Mohini w/o Ashok Kumar Bhutani and ors.

-Vs-

Mrs. Krishnakumari wd/o Ruplal Bhutani and ors.

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.D. Dewani, Adv. for the petitioners.

Shri R.L. Khapre, Adv. For respondent nos. 1 to 6.

Ms. Pamela Desouza, Adv. h/f Shri H.I. Kothari, Adv. for
respondent no. 14

CORAM : Z.A.HAQ, J.

DATED : 30th AUGUST, 2019

Heard.

In this petition, judgment and decree passed by the Civil Court in Regular Civil Suit No. 54 of 1974 on 13.04.2006 is challenged. By the judgment dated 13.04.2006, the award passed by the Arbitrator on 22.09.1993 under the provisions of the Arbitration Act 1940, was made rule of Court.

The judgment and decree passed by the Civil Court was earlier challenged before this Court by filing appeal under Section 39 of the Arbitration Act 1940 and Section 96 of the Code of Civil Procedure. This appeal was dismissed by the Division Bench of this Court by the judgment dated 11.07.2014. An application seeking review of the judgment dated 11.07.2014 was filed, which was also dismissed by the Division Bench of this Court by the order dated 10.10.2014. Petition for Special Leave to Appeal (C) No. 2470 of 2015

was filed which was summarily dismissed by the Hon'ble Supreme Court by the order dated 27.02.2015. The Review Petition (Civil) Nos. 1296-1297 of 2015 was filed, which were also dismissed by the Hon'ble Supreme Court by the order dated 07.05.2015. Then this Writ Petition came to be filed.

The main submission on behalf of the petitioners is that the appeal filed under Section 39 of the Arbitration Act, 1940 was dismissed, holding that it was not maintainable and the merits of the matter were not examined and therefore it is open for this Court to examine the gross illegalities committed by the Civil Court while confirming the award.

On merits, it is submitted that the defendant no. 2-Mukundlal Bhutani died before the judgment and decree was passed by the Civil Court, and the defendant no. 5-Rani Prakash w/o Gurdasmal Gulati and the defendant no. 6-Sarladevi d/o Diwanchand Bhutani also died before the judgment and decree was passed by the trial Court, and the legal representatives of these deceased-defendants were not brought on record. It is further submitted that the Civil Court failed to consider the provisions of Sections 40, 48 and 49 of the Indian Partnership Act, 1932 and Section 14 (1) and (2) of the Arbitration Act, 1940. According to the petitioners, all these challenges were not examined by the Division Bench as the appeal filed under Section 39 of the Arbitration Act 1940, was dismissed as untenable.

Another submission made on behalf of the petitioners is that the appeal under Section 39 (1) (vi) of the Arbitration Act, 1940 was provided on limited grounds and

accordingly, the Division Bench had examined the challenge and the legality of the judgment and decree passed by the Civil Court, and the challenges vis-a-vis the provisions of Sections 40, 48 and 49 of Indian Partnership Act, 1932 could not have been examined by the Division Bench in appeal. It is further submitted that the judgment and decree is obtained by the decree-holder by playing fraud and this aspect also could not have been examined by the Division Bench in appeal under Section 39 (1)(vi) of the Act of 1940. In this background, it is submitted that the legality of the judgment and decree passed by the Civil Court in Regular Civil Suit No. 54 of 1974 can be examined by this Court under Article 227 of the Constitution of India. To support the submission, reliance is placed on the judgment given by the Hon'ble Supreme Court in the case of *Kanak v. U.P. Avas Evam Vikas Parishad* reported in **(2003) 7 SCC 693** (particularly paragraph nos. 22 to 28).

Learned Advocate for the respondent nos. 1 to 6 raised an objection to the tenability of the petition itself on the ground that after the judgment passed in the First Appeal No. 444 of 2006, it is not open for this Court to re-examine the legality and validity of the judgment and decree passed in Regular Civil Suit No. 54 of 1974. It is argued that filing of this petition is an abuse of process of law. It is prayed that it be dismissed with exemplary costs.

After going through the judgment passed by the Division Bench of this Court in First Appeal No. 444 of 2006, I find that the submission made on behalf of the respondent nos. 1 to 6 has to be accepted. In my view, this Court cannot examine the legality and validity of the judgment and decree

passed in Regular Civil Suit No. 54 of 1974 in this writ petition.

Though the argument on behalf of the petitioners is that the appeal under Section 39 (1) (vi) of the Arbitration Act, 1940 was dismissed as untenable, it cannot be said that the points which were raised in the appeal were not examined. The submissions which were made on behalf of the appellants were considered in *extenso*. The Division Bench recorded that objections as per Section 30 of the Arbitration Act 1940, were not filed within limitation and therefore there was no occasion for the trial Court to set aside the award. An alternate submission was made by the appellants in the Appeal, that the Civil Court should have suo motu exercised its power and set aside the award. Learned Advocate for the petitioners relied on the judgment given by this Court in the case of Union of India vs. Steelfab Engi. Corpn. reported in **2018(4) Mh.L.J. 496** to support the above argument that the Civil Court should have exercised suo motu powers and should have set aside the award. The above argument was made on behalf of the appellants in appeal and the Division Bench repelled it as reflected in paragraph no. 8 of the judgment in First Appeal No. 444 of 2006.

The judgment given by the Hon'ble Supreme Court in the case of Kanak and anr. -vs- Avas Evam Vikas also does not support the petitioners on the point that this Court can examine the legality and validity of the judgment and decree passed in Regular Civil Suit No. 54 of 1974, under Article 227 of the Constitution of India. After dismissal of First Appeal No. 444 of 2006 on consideration of the challenges as were raised in the appeal, it would not be open

for this Court to examine the contentions of the petitioners regarding legality and validity of the judgment and decree passed in Regular Civil Suit No. 54 of 1974. Single Judge of this Court exercising the jurisdiction under Article 227 of the Constitution of India cannot undertake the exercise of correcting the alleged errors committed by the Civil Court, when the Division Bench of this Court has refused to interfere with the judgment and decree in question.

In view of the above, there is no reason to consider the challenges in this petition.

Hence, the Writ Petition is **dismissed**. In the circumstances, the parties to bear their own costs.

The amount deposited by the petitioners with the Registry of this Court alongwith interest on it, if any, be given to the respondent nos. 1 to 6.

JUDGE

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